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Partisan Justice

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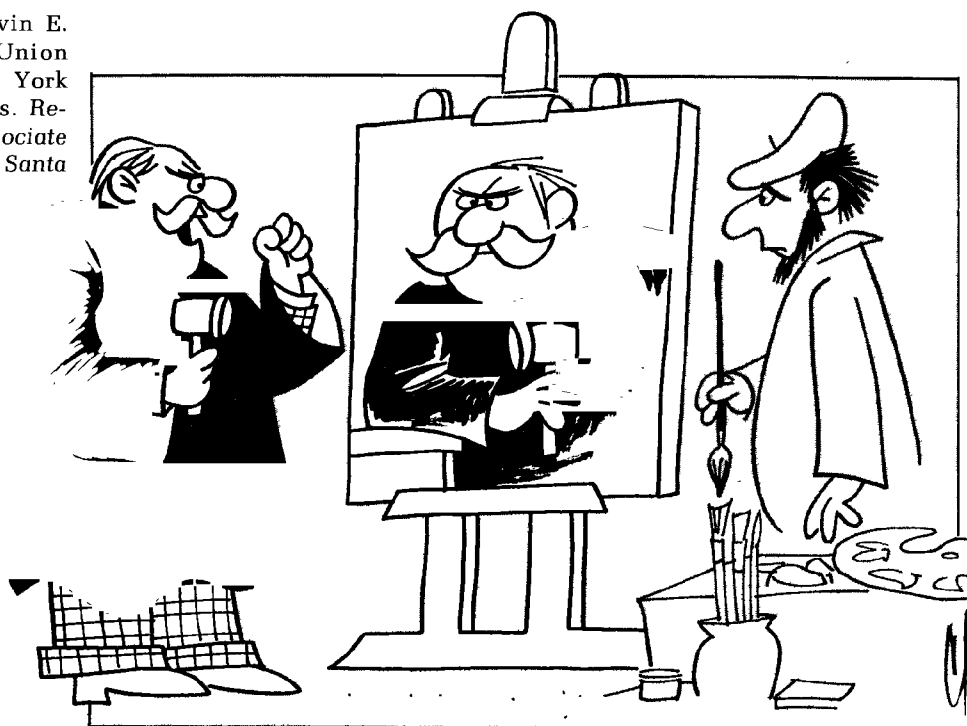
Lawyers

PARTISAN JUSTICE. By Marvin E. Frankel. Hill and Wang, 19 Union Square West, New York, New York 10003. 1980. \$9.95. 134 pages. Reviewed by Dorothy Glancy, associate professor of law, University of Santa Clara School of Law.

The adversary system needs more critics like Marvin Frankel. After more than 30 years of lawyering, judging, teaching, learning, and living the law, Judge Frankel knows how the adversary system operates in the United States. He eloquently translates that practical understanding into a penetrating analysis of the ways we seek just resolutions of legal conflicts. Although Frankel believes our legal process to be fundamentally sound, his book focuses on "certain excesses" the adversary system has "spawned over the centuries, most notably an excessive tolerance for efforts by the contestants to distort the truth."

In the midst of our profession's assessment and revision of its rules of professional conduct, Frankel's contribution is timely. As a member of the A.B.A. Commission on Evaluation of Professional Standards, Frankel has worked since the summer of 1977 on the development of the draft Model Rules of Professional Conduct issued in January, 1980. He candidly points out that the work of the commission forms part of the background for his analysis and criticism of our system of justice which sometimes seems all too willing to sacrifice candor and truth finding on the altar of partisanship.

Frankel's analysis divides into two parts: first, a description of the adversary system as it operates in the United States and then an argument, or series of arguments, for a variety of changes in that system. What ties the whole together is a vision of a system of justice founded on ideals of truth seeking, equal treatment, and participation by all parties in full and fair judicial hearings. Despite his remorseless catalog-



"It doesn't do me justice!"

ing of its defects, Frankel is ultimately an optimist that the adversary system can function well as a system of justice.

His masterful evocation of the adversary system as practiced in the United States today begins with humankind's eternal quest for justice. He brings the adversary system and its various participants vividly to life: "At center stage in the flawed performance is the advocate — sometimes loved and appreciated, especially by successful clients, but also denounced by others as 'mouthpiece,' 'hired gun,' 'mercenary warrior,' 'shyster.'" Then there is the judge who, Frankel reminds us, is also often cast in an adversarial role, "not quite the imperial one some have seen, but more than that of the bland umpire others perceive or desire. An effort to suggest the character of the alloy was made a while ago by describing it as 'umpireal.'" Finally, there is the public, a participant that Frankel candidly characterizes as "a compendious ambiguity." It is difficult to imagine a more engaging description of the complex reality of the legal system than Frankel gives us.

In the second part Frankel narrows his focus to a varied series of specific changes designed to eliminate some of the excesses that mar the adversary system. His suggestions range from the adoption of more truth-oriented rules of professional conduct, to more humane sentencing of those convicted of crimes, to elimination of *Miranda* exclusionary requirements in criminal cases, to use of videotape and noncontinuous trials. What saves this second part from dissolving into a grabbag of the new and different, or the old and familiar, is Frankel's overarching vision that the entire enterprise is about discovering and acting on the truth. Rather than debate the conundrum "what is truth?," Frankel simply postulates that "truth may be taken to embrace (1) accurate accounts by competent people of what they genuinely believe they recall from sensory experience — things seen, heard, smelled, etc., and (2) honest production of papers and objects relevant to legal controversies. You may be wrong when you genuinely believe you saw your neighbor's cat yesterday. But if you do believe it and

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